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No. 05-1468

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# In the Supreme Court of the United States

RONALD WARRUM, IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSEPH F. SAYYAH, DECEASED, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether, in a State in which a decedent's death extinguishes his cause of action for personal injury and gives rise to a distinct wrongful death cause of action to compensate his survivors, an administrative claim filed by the decedent before his death to recover for his own personal injuries satisfies the administrative exhaustion requirement of the Federal Tort Claims Act, 28 U.S.C. 2675(a), with respect to a wrongful death suit subsequently brought in district court on behalf of the survivors.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-12) is reported at 427 F.3d 1048. The opinion of the district court (Pet. App. 14-19) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 25, 2005. A petition for rehearing was denied on February 14, 2006 (Pet. App. 20-21). The petition for a writ of certiorari was filed on May 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Subject to certain restrictions, the Federal Tort Claims Act (FTCA or Act) effects a waiver of sovereign

immunity for tort claims against the United States "under circumstances where the *United States, if a private* person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The phrase "law of the place" has been construed to incorporate by reference the substantive provisions of the law of the particular State in which the wrong occurred. See *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994).

Although the United States' substantive liability differs from State to State, the FTCA establishes certain uniform procedural requirements that limit the United States' waiver of immunity. Section 2675(a) establishes a requirement of administrative exhaustion: "[a]n action shall not be instituted" under the FTCA "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. 2675(a). The failure of the agency to make a final disposition of the claim within six months after it is filed shall, at the option of the claimant, be deemed a final denial of the claim. *Ibid.* Section 2401(b) establishes the time limitations for filing an administrative claim and, subsequently, an action in district court: "A tort claim against the United States shall be forever barred [1] unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or [2] unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b).

2. Petitioner is the personal representative of the estate of Joseph Sayyah, who died after receiving care

at a government-run medical facility. Petitioner contends that in September 1998, Sayyah was treated at the Department of Veterans Affairs (VA) clinic in Evansville, Indiana, by a VA doctor who failed to diagnose properly his medical condition. Pet. App. 3. Later, in March 1999, Sayyah was diagnosed as suffering from Stage III cancer of the esophagus. *Ibid.* In December 2000, Sayyah filed an administrative claim with the VA, alleging that the Evansville VA clinic had failed to diagnose his cancer, resulting in a decreased chance of favorable treatment. *Ibid.*[1] The VA denied Sayyah's claim on November 27, 2001; he died on February 4, 2002. *Ibid.* On May 22, 2002, petitioner, as personal representative of Sayyah's estate, filed this wrongful death suit against the United States pursuant to the FTCA, alleging that the misdiagnosis at the Evansville VA clinic resulted in Sayyah's death. *Id.* at 4. Neither petitioner nor anyone else presented an administrative tort claim notice to the VA asserting a claim in connection with Sayyah's death. *Id.* at 15.

3. The district court granted the government's motion to dismiss based upon petitioner's failure to file an administrative claim for wrongful death prior to instituting suit. Pet. App. 14-19. The court observed that it was "undisputed that [petitioner] did not give notice to the [VA] of the wrongful death claim that is now asserted in the Complaint." *Id.* at 17. Moreover, the court noted, "[t]he fact that Mr. Sayyah gave notice of a medical mal-

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[1] Sayyah's administrative claim was timely with respect to his personal injury claim because it was filed within two years of the date on which he learned of the cancer that the VA physician had failed to diagnose earlier. See *United States* v. *Kubrick*, 444 U.S. 111, 122-124 (1979) (medical malpractice claim accrues under the FTCA when plaintiff knows of both the existence and cause of the injury).

practice claim prior to his death does not serve to save [petitioner's] claim, because a claim for wrongful death do[e]s not accrue for purposes of the FTCA until the date of death." *Ibid.* (citing *Fisk* v. *United States*, 657 F.2d 167, 173 (7th Cir. 1981)). Because petitioner's wrongful death claim had not accrued at the time Sayyah filed his administrative claim for personal injury, the court held, "it could [not] have been 'presented'" to the VA by the filing of that administrative claim. *Ibid.* (alteration to conform to original).

The district court also rejected petitioner's assertion that the complaint states a separate claim under Indiana's survival statute, Ind. Code §§ 34-9-3-1 *et seq.* (1998). Pet. App. 17-18. Under the Indiana survival statute, a cause of action for personal injuries is generally extinguished by the injured person's death. Ind. Code § 34-9-3-1(a)(6) (1998). There is a narrow exception to that rule under which a personal injury claim survives and may be maintained to recover the decedent's damages from the injury before his death, but only if the injured party dies from a different cause. See *id.* at § 34-9-3-4. Here, the court concluded, both the personal injury and wrongful death are alleged to have been caused by the same government negligence, and, thus, the personal injury claim "is not preserved" by the narrow exception created by Indiana's survival statute. Pet. App. 19.

4. The court of appeals affirmed. Pet. App. 2-12. The court noted that because state law "determine[s] the substantive nature of the plaintiff's cause of action" under the FTCA, petitioner's cause of action is governed by Indiana law. *Id.* at 4-5. Under Indiana's wrongful death statute, a cause of action for wrongful death "is independent and not derivative of the underlying claim

for personal injury." *Id.* at 7 (citing *Fisk*, 657 F.2d at 170-171). A wrongful death action is intended "not to compensate for the injury to the decedent, but rather to create a cause of action to provide a means by which the decedent's survivors may be compensated for the loss they have sustained by reason of the death." *Id.* at 8 (quoting *Fisk*, 657 F.2d at 170). In such circumstances, "a wrongful death claim stemming from medical malpractice does not accrue for purposes of the FTCA's statute of limitations until the date of death." *Ibid.* (citing *Fisk*, 657 F.2d at 170-172); see *id.* at 7 ("[U]ntil the death of the plaintiff's decedent there can be no claim for wrongful death, because until that event occurs, the damages the statute is intended to remedy have not been inflicted on the plaintiff.") (quoting *Fisk*, 657 F.2d at 171). Thus, the court of appeals "agree[d] with the district court that the wrongful death claim at issue here did not accrue and could not have been presented to the VA until the date of Sayyah's death." *Id.* at 8.

The court further explained that dismissal of this suit for failure to file an administrative claim for wrongful death comports with "[a] straightforward reading of" Section 2675(a), under which suit against the United States on a claim for money damages for "personal injury or death" may not be instituted "unless the claimant *shall have first presented the claim* to the appropriate Federal agency." Pet. App. 6. This is a suit "for money damages for a *death*, but it was not preceded by an administrative claim for a *death*." *Id.* at 6-7. Moreover, the court continued, requiring an administrative claim for wrongful death "comports with the exhaustion requirement's purpose of allowing the relevant government agency the opportunity to investigate and settle meritorious claims lodged against it," because a wrong-

ful death claim to compensate the decedent's survivors for their losses due to his death "necessarily involves causation and damages questions distinct from those at issue in a malpractice claim that does not involve a death." *Id.* at 9 (citations omitted). Thus, the court concluded, "to meaningfully evaluate the extent of its liability in a death case, the federal agency must have notice of the death, not merely an assertion of medical malpractice." *Ibid.*

The court of appeals rejected petitioner's contention that a procedural change in Indiana law, which bars wrongful death actions based upon medical malpractice that are brought more than two years after the alleged act of medical negligence, means that a wrongful death action arising from medical malpractice is no longer an independent claim. Pet. App. 10-11. The court explained that the Indiana Medical Malpractice Act "did not alter the substantive nature of a wrongful death claim under Indiana law" (*id.* at 10) or "create new claims for relief" (*id.* at 11); rather, it only required "otherwise recognized" tort claims arising in the medical malpractice context to be "'pursued through the procedures' of the Act." *Ibid.* (quoting *Chamberlain* v. *Walpole*, 822 N.E. 2d 959, 963 (Ind. 2005)). In any event, the court noted, for purposes of the FTCA, federal law governs procedural matters such as the statute of limitations, accrual dates, and exhaustion. *Ibid.* (citing *Fisk*, 652 F.2d at 171); see *id.* at 5 ("the FTCA imposes its own procedural rules").

Finally, the court of appeals upheld the rejection of petitioner's asserted "survival" personal injury claim, because that claim is based on the same alleged negligence as the wrongful death claim, and thus does not satisfy the requirement of the Indiana survival statute

that the claimant's death must have resulted from a different cause in order for his personal injury claim to survive his death. Pet. App. 11-12.

## ARGUMENT

Petitioner challenges (Pet. 6-17) the decision of the court of appeals that a cause of action for wrongful death on behalf of a decedent's survivors under Indiana's wrongful death statute is a separate "claim" for purposes of the FTCA's administrative exhaustion requirement than the "claim" on behalf of the decedent for personal injury. That decision is correct and does not conflict with any decision of this Court. The only other court of appeals decision with which the opinion below arguably conflicts pre-dates and is inconsistent with this Court's most recent precedent concerning the FTCA's administrative filing requirement. Further review is therefore unwarranted. Petitioner additionally claims (Pet. 17-22) that the court of appeals misapplied Indiana's survival statute. That question of state law does not warrant this Court's review and, in any event, a decision of the State Supreme Court confirms that the court of appeals' construction of state law was correct.

1. a. The court of appeals correctly concluded that Sayyah's administrative claim regarding his own personal injuries did not encompass a claim on behalf of his survivors for the losses they suffered as a consequence of Sayyah's wrongful death. A wrongful death action under Indiana law compensates different damages suffered by different persons, arising at a different time, than a claim by the decedent for his own personal injury. Both the text of the FTCA and the purposes of its administrative exhaustion requirement support the court of appeals' conclusion that a wrongful death action is a

different "claim" that must be filed separately with the administrative agency.

The text of the FTCA's limitations period states that a "tort claim" must be "presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. 2401(a). That language assumes that a distinct cause of action, with a different accrual date, is a separate "claim" for purposes of the FTCA's exhaustion requirement. That conclusion is reinforced, when the new cause of action is on behalf of a different person for different injuries, by additional text of the exhaustion provision itself, which requires that "*the claimant* shall have first presented the claim to the appropriate Federal agency and *his claim* shall have been finally denied by the agency." 28 U.S.C. 2675(a) (emphases added).

As this Court has explained, the purpose of the FTCA's administrative claim requirement is to afford the government a "fair opportunity to investigate and possibly settle the claim before the parties must assume the burden of costly and time-consuming litigation." *McNeil* v. *United States*, 508 U.S. 106, 111-112 (1993); see S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966) (requiring presentation of an administrative claim as a prerequisite to suit will "ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States"). To that end, the administrative claim must do two things: it must provide the agency with "the relevant facts in enough detail to alert the [agency] to the presence of" the claim, and it must request "a sum certain for those injuries." *Palay* v. *United States*, 349 F.3d 418, 425 (7th Cir. 2003). See also *Goodman* v. *United States*, 298 F.3d

1048, 1055 (9th Cir. 2002) (FTCA administrative claim must "contain[] a general description of the time, place, cause and general nature of the injury and the amount of compensation demanded."); *Burchfield* v. *United States*, 168 F.3d 1252, 1255 (11th Cir. 1999) (administrative claim must provide "written notice of [the claimant's] claim sufficient to enable the agency to investigate" and must "place[] a value on [the] claim"); *Romulus* v. *United States*, 160 F.3d 131, 132 (2d Cir. 1998) (per curiam) ("A claim must be specific enough to serve the purpose of the FTCA to enable the federal government to expedite the fair settlement of tort claims.").

Applying the statutory text in light of these purposes, the courts of appeals have held in numerous circumstances that an administrative claim filed by one individual does not satisfy the exhaustion requirement with respect to another individual's claim, "even though the third party's filing arguably puts the government on notice of the plaintiff's injury." *Brown* v. *United States*, 838 F.2d 1157, 1163 (11th Cir. 1988) (Tjoflat, J., concurring) (citing *Rucker* v. *United States*, 798 F.2d 891 (6th Cir. 1986); *Johnson* v. *United States*, 704 F.2d 1431 (9th Cir. 1983)). See *Manko* v. *United States*, 830 F.2d 831, 840 (8th Cir. 1987) (husband's administrative claim regarding personal injury did not satisfy the exhaustion requirement regarding his wife's claim for loss of consortium, even though the claim referred to her and "suggested that she had suffered a loss of consortium"); *Jackson* v. *United States*, 730 F.2d 808 (D.C. Cir. 1984) (administrative claim for wrongful death by decedent's parents did not satisfy exhaustion requirement with respect to survival claim or wrongful death claim by decedent's widow); *Lunsford* v. *United States*, 570 F.2d 221 (8th Cir. 1977) (unnamed members of a plaintiff class

ordinarily cannot rely on an administrative filing by a named class representative); *Caidin* v. *United States*, 564 F.2d 284 (9th Cir. 1977) (same).

b. The court of appeals correctly applied those principles to the facts of this case, in light of the substantive law of Indiana that gives rise to the underlying claims. The court of appeals correctly recognized that, under Indiana law, an injured party's claim for personal injury is extinguished upon that person's death, except for narrow circumstances not present here. See p. 21, *infra*. A new claim for wrongful death then accrues, and it may be brought by the decedent's personal representative on behalf of the decedent's survivors. The measure of damages in a wrongful death action is almost entirely distinct from the measure that would have been applicable in a suit brought by the injured person himself. Pet. App. 7-9.

The Supreme Court of Indiana has since confirmed the court of appeals' understanding of state law. In *Ellenwine* v. *Fairley*, 846 N.E.2d 657 (Ind. 2006), the Supreme Court stressed the "important distinction between the types of claims which may be brought as a result of alleged malpractice": a "negligence claim brought by or on behalf of the injured party," and a "wrongful death claim brought by the survivors of the party physically injured by the alleged malpractice." *Id.* at 662. Whereas the "negligence claim arises as soon as the negligent act occurs," the claim for wrongful death "does not exist until the exact moment that the individual dies," *id.* at 663, at which time "the malpractice claim * * * terminates," *id.* at 665 (citing Ind. Code § 34-9-3-1(a)(6) (2004)). The court found it "clear and obvious" that "a negligence claim and a wrongful death claim are two wholly separate causes of action[] which

must be brought by different parties and which, for the most part, provide damages for separate types of injuries." *Id.* at 662. Indeed, hospital and health care expenses are the "only measure of damages which is consistent between those recoverable in a negligence action and those recoverable in a wrongful death action." *Ibid.*[2]

In light of the complete separation under Indiana law between a personal injury claim and a wrongful death claim, the court of appeals was correct in holding that Sayyah's administrative claim regarding his own personal injuries, filed more than a year prior to his death, did not and could not satisfy the administrative exhaustion requirement for a wrongful death that accrued upon his death and was brought on behalf of his survivors to compensate them for their own losses. That is so not only as a legal matter, but also as a factual matter. Sayyah's administrative claim did not contain the facts that would be essential for the agency to fairly investigate and possibly settle a wrongful death claim —including the time, cause and circumstances of death and the amount of compensation claimed by the decedent's estate or dependents for their losses on account of the death—facts that could not be known until death had actually occurred. Without that information, the government could not fairly investigate or determine the extent of its liability, if any, for a death that had not yet

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[2] See, *e.g.*, *Elmer Buchta Trucking, Inc.* v. *Stanley*, 744 N.E.2d 939, 942-943 (Ind. 2001) (noting that, in a wrongful death action, "the damages are limited to the pecuniary loss suffered by those for whose benefit the action may be maintained," and that, therefore, a deduction must be made from the decedent's expected earnings "for the amount of personal maintenance expenses that the decedent would have incurred over the remainder of his lifetime").

occurred, nor could it determine a fair settlement value for the losses of survivors.

It is not enough for petitioner to assert that Sayyah's medical malpractice claim "put the government on notice of a potential wrongful death cause of action" (Pet. 13) because it is a "known fact that patients who suffer from undiagnosed or misdiagnosed cancer tend to die" (Pet. 12). This Court rejected that approach to the administrative exhaustion requirement in *McNeil*. In that case, the claimant brought suit under the FTCA for personal injury, then four months later he filed an administrative claim. 508 U.S. at 108. While the suit was pending, the agency denied the administrative claim, and the claimant sought to proceed with his prematurely-filed suit. *Ibid.* This Court, upholding dismissal of the suit, stressed that the statutory command of Section 2675(a) that "an 'action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied'" is "unambiguous," and that the courts "are not free to rewrite the statutory text." *Id.* at 111. Nor, the Court held, could strict "adherence to the straightforward statutory command" of administrative exhaustion prior to suit be dispensed with even when the agency in fact had a fair opportunity to investigate the same claim before the litigation had substantially progressed. *Id.* at 111-112. The Court recognized that, although it is tempting in a particular case to say that compliance with the administrative claim requirement was close enough, if not technically proper, because "the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims." *Id.* at 112. Under *McNeil*, it is clear that petitioner's (incorrect) assertion that the government was suffi-

ciently aware that a wrongful death claim on behalf of his survivors might arise does not excuse the need to comply with the requirements of administrative exhaustion should such a claim in fact arise.[3]

2. a. Contrary to petitioner's contention, there is no need for this Court to grant review of the court of appeals' correct decision in order to resolve a conflict among the circuits. The only court of appeals decision with which the judgment below arguably conflicts is that of the Eleventh Circuit 18 years ago in *Brown* v. *United States*, 838 F.2d 1157 (1988). In *Brown*, the decedent had administratively exhausted his claim for medical malpractice before filing an FTCA suit in district court, and the decedent's personal representative had filed an administrative claim with respect to a wrongful death claim under Florida law a week before she sought to add the wrongful death claim to the FTCA action. *Id.* at 1158-1159. The Eleventh Circuit held in those circumstances that the district court had jurisdiction over the wrongful death claim, even though "a Florida wrongful death action is clearly distinct from a personal injury action." *Id.* at 1161.

The *Brown* decision appears to have been influenced by the fact that the personal representative had filed an administrative claim for wrongful death and that it did "not appear from the record that any substantial action

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[3] The fact that a claimant's personal injury claim is denied by the agency does not mean that filing an administrative claim for wrongful death would be a meaningless exercise. Other facts may have developed in the interim to support (or negate or mitigate) a wrongful death claim. Moreover, whereas the original personal injury claim may be comprised largely of hard-to-verify claims for pain and suffering, the wrongful death claim may involve more easily ascertainable economic damages.

was taken" by the agency, although more than six months had passed after the claim was filed before the wrongful death action was tried. 838 F.2d at 1159-1160, 1161 & n.7. That fact, combined with the court of appeals' belief that "[i]t is unlikely that the agency would conduct a second investigation or otherwise act any differently," led the Eleventh Circuit to hold that requiring the personal representative separately to exhaust the administrative claim procedure would be "overly technical" and "serve no useful purpose." *Id.* at 1161.[4]

Significantly, *Brown* was decided before this Court's decision in *McNeil*. As discussed above, *McNeil* is incompatible with the view in *Brown* that the courts should eschew a "technical" application of the exhaustion requirement. In particular, *McNeil* rejected any notion that a court could rely on the fact that an administrative claim was ultimately denied to excuse the premature filing of an FTCA action. Because the Eleventh Circuit has not had an opportunity to review its *Brown* decision in light of *McNeil*, it is uncertain whether there will ever be a need for this Court to review the supposed conflict identified by petitioner.

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[4] Judge Tjoflat concurred in the judgment on the separate ground that the United States was entitled to a complete setoff against the plaintiff's recovery. He vigorously disputed, however, the *Brown* majority's assumption that no further facts would be needed, and no purpose served, by a full administrative consideration of the wrongful death claim. See 838 F.2d at 1164 (citing the "substantially different * * * measure of damages" for the two types of claims, which would require development of "information that the government would not have had any reason to seek out when investigating the settlement value of the personal injury claim"); see also *id.* at 1164 nn. 2-3; *id.* at 1163 (describing the executor as a "claimant who never filed an administrative claim in the first place" and who "seek[s] to rely on the filing of another claimant who suffered a wholly distinct injury").

b. Petitioner's assertion (Pet. 7-12) of a conflict between the court of appeals' decision and other appellate decisions holding that an administrative claim need not articulate a theory of liability is mistaken. Notably, as petitioner concedes (Pet. 7), the Seventh Circuit has itself recognized that there is no requirement to specify a particular theory of liability in an administrative claim. See *Palay*, 349 F.3d at 425. There is no conflict between that rule and the Seventh Circuit's decision here because this case did not involve a mere change in the plaintiff's legal theory of liability, but a new and entirely different claim, which accrued at a different time, after the occurrence of a different event, on behalf of different beneficiaries, to compensate different injuries.

Tellingly, in all of the cases cited by petitioner with respect to this contention, all the events and elements of damages for which the plaintiff sought to recover in court occurred prior to the filing of the administrative claim, and the only issue before the court was whether —regardless of what theory of liability they would support—the facts set forth in the administrative claim provided sufficient notice of the plaintiff's injury and damages to allow the agency a fair opportunity to investigate and possibly settle the claim. See *Palay*, 349 F.3d at 425-427 (inmate's administrative claim of bodily injury, pain, suffering and repeated seizures resulting from his transfer to a holding unit at which a fight broke out between rival prison gangs sufficiently alerted the government to a claim for negligent reassignment); *Santiago-Ramirez* v. *Secretary of the Dep't of Defense*, 984 F.2d 16, 20 (1st Cir. 1993) (administrative claim asserting "emotional distress and mental suffering" from employer's interrogation, harassment and discharge of claimant on suspicion of theft satisfied the exhaustion

requirement for the employee's FTCA suit based on the same claims, but not for her husband's claim for loss of consortium); *Broudy* v. *United States*, 722 F.2d 566, 567-569 (9th Cir. 1983) (widow's administrative claim regarding husband's death from radiation exposure held sufficient to encompass a claim for failure to warn husband of the hazards of radiation exposure); *Goodman* v. *United States*, 298 F.3d 1048, 1052, 1057 (9th Cir. 2002) (widower's administrative claim alleging that his wife died of "mistakes" relating to an experimental treatment constituted exhaustion with respect to claim for lack of informed consent, as the agency's response demonstrated); *Burchfield* v. *United States*, 168 F.3d 1252, 1255 (11th Cir. 1999) (administrative claim alleging claimant developed osteoporosis and other maladies from steroid medication provided adequate notice of claim for failure to prescribe supplements to counteract adverse effects of the medication). Thus, none of those cases involved the circumstances presented here, where a party other than the administrative claimant seeks to sue on a claim arising in substantial part from facts not yet in existence when the administrative claim was filed.

3. Because the court of appeals' decision concerns the requirements of the FTCA's administrative exhaustion requirement, and whether petitioner may rely upon the administrative claim filed by Sayyah, petitioner's discussion of a purported circuit conflict regarding when a wrongful death action accrues for purposes of the FTCA's statute of limitations is not directly on point. In any event, although petitioner asserts (Pet. 13-14) an inconsistency between the decision below and decisions of the Fourth and Sixth Circuits in *Miller* v. *United States*, 932 F.2d 301 (4th Cir. 1991), and *Chomic* v. *United States*, 377 F.3d 607 (6th Cir. 2004), cert.

denied, 544 U.S. 948 (2005), a careful review of those cases demonstrates that any apparent inconsistencies are explained by substantive differences between the relevant States' laws regarding the claims asserted. In each case, the court looked to the substantive law of the State to determine the nature of the claim asserted and then looked to federal law to ascertain whether the claimant had met the procedural requirements for perfecting such a claim under the FTCA.

a. Because the FTCA does not create "new causes of action but [requires government] acceptance of liability under circumstances that would bring private liability into existence" under state law, *Feres* v. *United States*, 340 U.S. 135, 141 (1950), the date on which a cognizable injury comes into being for purposes of the federal limitations period in 28 U.S.C. 2401(b) necessarily depends on the nature of the cause of action under state law. See 28 U.S.C. 2674. The application of that principle has special significance in the wrongful death context, because the generic term "wrongful death" embraces two distinct causes of action—one, none, or both of which may be provided under state law. See Wex S. Malone, *The Genesis of Wrongful Death*, 17 Stan. L. Rev. 1043, 1044 (1964-1965). First, wrongful death can denote a new and *independent* cause of action asserted by third parties, usually close relatives of the decedent, for their own losses resulting from the death. Second, the term "wrongful death" is sometimes used to refer to a *survival* cause of action—that is, the decedent's own personal injury claim that pre-existed death and that, solely by operation of statute, "survives" death.

The Seventh Circuit's decisions in the present case and *Fisk* hold that a wrongful death cause of action accrues for purposes of the FTCA at the time of the dece-

dent's death. Pet. App. 8; *Fisk* v. *United States*, 657 F.2d 167, 171 (1981). Those cases applied the law of Indiana, which creates a statutory cause of action based on the decedent's death. See Pet. App. 7 ("[U]ntil the death of the plaintiff's decedent there can be no claim for wrongful death, because until that event occurs, the damages the statute is intended to remedy have not been inflicted on the plaintiff.") (quoting *Fisk*, 657 F.2d at 171, and citing *Louisville, Evansville & St. Louis R.R.* v. *Clarke*, 152 U.S. 230, 238 (1894)). See Restatement (Second) of Torts § 899 cmt. c (1979) ("A cause of action for death is complete when death occurs.").

In contrast, the law of Michigan (at issue in *Chomic*) "clearly provides not that death creates a cause of action, but that death does not extinguish an otherwise valid cause of action," and permits the decedent's personal representative to stand in the decedent's shoes. 377 F.3d at 611 (quoting *Hardy* v. *Maxheimer*, 416 N.W.2d 299, 307 n.17 (Mich. 1987)). Similarly, Virginia law (at issue in *Miller*) "does not create a new cause of action, but only a right of action in a personal representative to enforce the decedent's claim for any personal injury." 932 F.2d at 303. When an estate asserts a survival claim, "the statute of limitations necessarily runs from the time of [the decedent's] original injury," Restatement (Second) of Torts § 899 cmt. c, because that injury is the event giving rise to the claim. See *Chomic*, 377 F.3d at 612; *Miller*, 932 F.2d at 303-304. Death operates only to transfer the legal right to assert the claim from the decedent to his estate. Thus, the difference in the accrual times of the claims in the foregoing cases for purposes of deciding whether the claim was timely un-

der the FTCA is entirely explained by the substantive nature of the claim under state law.[5]

b. The fact that, as a matter of Indiana law, a wrongful death action in which the death was caused by medical malpractice must be brought within two years of the alleged malpractice, see Pet. 14-15; *Ellenwine*, 846 N.E.2d at 664-665, does not alter the conclusion that Sayyah's administrative claim for personal injury did not encompass the separate claim by his representative that arose after his death for the injuries suffered by his survivors as a result of that death. In *Ellenwine*, the Supreme Court of Indiana made clear that, despite the legislature's decision to bar wrongful death claims that accrue more than two years after the alleged malpractice that ultimately resulted in death, the wrongful death action is "wholly separate" from the injured

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[5] Texas law (at issue in *Johnston* v. *United States*, 85 F.3d 217 (5th Cir. 1996)) appears to be something of a hybrid. According to the Fifth Circuit, Texas's wrongful death statute "provides a statutory cause of action for damages arising from a negligently inflicted injury that causes an individual's death," but that statutory cause of action is "entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death." *Id.* at 222. In that context, the Fifth Circuit held that the cause of action accrued for purposes of the FTCA at the time of the decedent's death. *Id.* at 224 ("we are reticent to hold that a wrongful death action accrues pre-death"). Because of the differences between Indiana and Texas law, it is not clear that there is any inconsistency between the Fifth Circuit's holding in *Johnston* and the court of appeals' analysis here. Even if there were, however, it would not benefit petitioner. If, as petitioner contends (Pet. 15), the Fifth Circuit would hold that *all* wrongful death claims, of either the independent or derivative kind, accrue for FTCA purposes at the time of the decedent's death, that holding would support, rather than undermine, the Seventh Circuit's holding here that Sayyah's administrative claim for personal injuries filed while he was alive did not encompass a claim for wrongful death that did not accrue until later.

party's negligence claim, the two "must be brought by different parties," and the two, "for the most part, provide damages for separate types of injuries." 846 N.E.2d at 662.

Petitioner complains that, under the court of appeals' approach, "the liability of the United States is far broader than that of a private health care provider in Indiana." Pet. 14.[6] There is nothing remarkable, however, in the fact that the uniform federal two-year statute of limitations for FTCA claims will, in some cases, permit a suit to go forward that would be time-barred if brought in state court against a private party. See *Johnston*, 85 F.3d at 220 ("we look to state law to determine whether the plaintiff's action is premature, but to federal law to determine whether the action is stale") (citation and emphasis omitted); *id.* at 222 n. 6 (noting that Louisiana's statute of limitations for wrongful death claims is one year, and that "under the two-year FTCA limitations period the United States is exposed to liablity where a private person in Louisiana is not"). That is simply a function of the fact that Congress has adopted a separate federal statute of limitations to govern claims brought under the FTCA.[7]

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[6] We note that, if the Indiana statute were construed as a statute of repose, such that no cause of action for wrongful death can exist under state law (regardless of when it accrued) if more than two years passed between the time the medical care was provided and when the death occurred, that substantive limitation on liability under state law would also preclude a suit against the United States under the FTCA. See, *e.g.*, *Simmons* v. *United States*, 421 F.3d 1199 (11th Cir. 2005); *Simmons* v. *Sonyika*, 394 F.3d 1335 (11th Cir. 2004).

[7] The court of appeals observed that there is some question whether Indiana courts would hold that application of the state statute of limitations to cut off a claim before it accrues violates the State's constitution. See Pet. App. 10 (citing *Martin* v. *Ritchey*, 711 N.E.2d

4. Finally, petitioner's assertion (Pet. 17-19) that the court of appeals erred in failing to construe the complaint to state an alternative survival cause of action for Sayyah's medical malpractice claim does not warrant this Court's review. As both courts below noted (Pet. App. 12; *id.* at 17-19), a personal injury claim survives the injured party's death only if he "subsequently dies from causes other than those personal injuries." Ind. Code § 34-9-3-4 (1998). Indeed, the very case relied upon by petitioner, *Cahoon* v. *Cummings*, 734 N.E.2d 535 (Ind. 2000), makes clear that "[i]f the alleged result of the defendant's acts that increase the risk of harm is death itself," the only action available is one for wrongful death. *Id.* at 544; Pet. App. 12. Paragraph 12 of petitioner's complaint quite clearly states that "[a]s a result of [the] negligence, carelessness and medical malpractice of the defendant's employees, Sayyah's condition caused him to suffer pain, mental anguish, bodily injury and *ultimately caused his death*." See Pet. 19 (emphasis added). Thus it was petitioner's own allegation, and not the courts' misconstruction of state law, that defeated any survival claim.

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1273 (Ind. 1999)). The Indiana Supreme Court did not address that question in *Ellenwine*, in which it held that, under the specific wrongful death and medical malpractice provisions relating to children, the limitations period for the wrongful death of a child is the first to expire of the medical malpractice limitations period (the child's eighth birthday) or the child wrongful death limitations period (two years from the date of death). 846 N.E.2d at 666.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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